BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
The Petition of the State of Minnesota	)	
Acting by and Through the Minnesota	)	
Department of Transportation and the	)	
Minnesota Department of Administration,	)	CC Docket No. 98-1
for a Declaratory Ruling Regarding	)	
the Effect of Sections 253(a), (b)	)	
and (c) of the Telecommunications Act	)	
of 1996 on an Agreement to Install Fiber	)	
Optic Wholesale Transport Capacity	)	
in State Freeway Rights-of-Way	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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March 9, 1998

SUMMARY

The Agreement that the State of Minnesota has signed granting to one entity exclusive access to state highway rights-of-way for a minimum period of ten years will prevent any other carrier wishing to install facilities along these important routes from doing so. This will have the effect of prohibiting facilities-based carriers from providing telecommunications services in the manner of their choosing and thus violates Section 253(a) of the Telecommunications Act of 1996. Further, the State's action has not been shown to be necessary to protect the public safety nor to be permissible nondiscriminatory management of the state's rights-of-way. Therefore, rather than granting the requested declaratory ruling, the Commission should preempt the state's action and its enforcement of the Agreement as violative of Section 253.

The instant petition is illustrative of some of the difficulties that new entrants and incumbents alike are having dealing with the myriad regulations and requirements that cities and states are imposing on carriers for use of the public rights-of-way. Thus, the Commission has the opportunity in ruling on the petition to reaffirm that Section 253 of the Act gives no new or additional powers relating to rights-of-way to the states and local governments and that the existing powers are limited to reasonable and nondiscriminatory time, place and manner regulation (including measures designed to ensure that rights-

of-way are returned to the condition that they were prior to any construction) and the collection of fees limited to the amount necessary to administer the rights-of-way in a timely, fair and reasonable manner.

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I. INTRODUCTION

The Association for Local Telecommunications Services ("ALTS"), pursuant to Public Notice DA 98-32, released January 9, 1998, and Public Notice DA 98-236, released February 6, 1998, hereby files its Comments on the request for Declaratory Ruling filed by the State of Minnesota. ALTS is the national trade association representing facilities-based competitive local exchange carriers. The members of ALTS have a vital interest in ensuring that the access to state and municipal rights-of-way is administered in a fair, timely, and competitively neutral manner and in accordance with the Telecommunications Act of 1996.

The agreement that the State of Minnesota has signed

granting to one entity exclusive access to state highway rights-of-way for a minimum period of ten years will have the effect of prohibiting carriers from providing telecommunications services and violates Section 253(a) of the Telecommunications Act. Further, the State has not shown that exclusive access to the rights-of-way is "necessary" to protect the public safety nor that its action is permissible nondiscriminatory management of its rights-of-way. Therefore, the Commission should refuse to issue the requested ruling and should, instead, preempt the state's action as violative of Section 253(a).

At the same time, the submission of the request for the ruling together with other actions that have been undertaken across the country in the two years since the passage of the Act mandate that the Commission further articulate and define the permissible actions that states and local authorities may take under the guise of rights-of-way management.

There are over 40,000 municipalities (and of course fifty states) in the country. Many of these municipalities and states are in the process of reviewing their laws and regulations relating to access to state and municipal rights-of-way. This has resulted in a morass of differing requirements, which, in turn, has resulted in significant delay and expense for carriers seeking to provide service. Consequently, consumers have been denied some of the benefits of a vigorous competitive

telecommunications marketplace.

The Commission needs to reaffirm that 1) Section 253 of the Act gives no new or additional powers relating to rights-of-way to the states and local governments; rather it merely preserves certain powers that they had prior to enactment, 2) those powers are limited to reasonable and nondiscriminatory time, place and manner regulation like coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, tracking of the various systems using the rights-of-way, and measures designed to ensure that rights-of-way are returned to the condition that they were in prior to any construction, and 3) the collection of fees should be limited to the amount necessary to administer the rights-of-way in a timely, fair and reasonable manner.

II. BACKGROUND

The State of Minnesota, acting by and through the Minnesota Department of Transportation and the Minnesota Department of Administration on December 31, 1997, filed at the Commission a Petition for Declaratory Ruling that an agreement (the "Agreement") it had signed relating to access to state freeway rights-of-way is consistent with Section 253 of the Tele-

communications Act of 1996.[1] The Agreement between the State and ICS/UCN LLC (referred to as the "Developer") and Stone and Webster Engineering Corporation grants to the Developer exclusive access for a period of ten years to certain State freeway rights-of-way for longitudinal[2] installation of fiber optic cable in exchange for the Developer's provision of a share of lit and dark capacity to the State for use in meeting its telecommunications needs. The agreement also gives to the Developer a right of first negotiation to extend the period of the agreement for an additional ten years.

The request for a declaratory ruling was prompted by objections to the agreement that have been voiced by a number of incumbent local exchange carriers in Minnesota. These carriers have alleged that the agreement violates Section 253(a) because the exclusive right of access to the rights-of-way impedes competition and effectively prohibits carriers from providing service by foreclosing a primary route into and out of major

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[1] Specifically, the Petition seeks a ruling that the Agreement is consistent with the requirements of Sections 253(a), (b) and (c) of the Act. The State has sought "expedited" review because of the critical nature of these issues and the fact that several other states apparently are considering entering into similar agreements. ALTS agrees that resolution of issues relating to use of state and municipal rights-of-way is critical and that the Commission must act expeditiously to resolve these issues.

[2] "Longitudinal" access is access that is parallel to the rights-of-way as opposed to access that only allows a carrier to cross over or under the rights-of-way.

communities in Minnesota.

The State argues, first, that Section 253 of the Telecommunications Act does not apply to telecommunications infrastructure. Second, it argues that even if that section does apply to infrastructure, the exclusive nature of the rights-of-way agreement does not prohibit or have the effect of prohibiting an entity from providing telecommunications service because the agreement requires the Developer to collocate fiber of other entities in the rights-of-way at the time of initial construction and to make available capacity on the network to any other carrier on a competitively neutral and non-discriminatory basis. The State also argues that if a carrier wants to construct its own facilities there are sufficient alternatives to enable a carrier to so, albeit not along the particular rights-of-way at issue.

Even if the exclusive nature of the agreement "implicate[s]" Section 253(a), the State argues that the "grant of exclusive longitudinal access to the freeway rights-of-way represents a legitimate exercise of the rights acknowledged by Sections 253(b) and (c) to maximize the safety of the traveling public and transportation workers and to manage these unique rights-of-way."[3]

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[3] Petition at 5.

III. SECTION 253 REQUIRES THE COMMISSION TO PREEMPT IF THE AGREEMENT HAS THE EFFECT OF PROHIBITING THE PROVISION OF SERVICE, IS UNNECESSARY TO PROTECT THE PUBLIC SAFETY AND WELFARE, OR IS A DISCRIMINATORY OR NON-COMPETITIVELY NEUTRAL MANAGEMENT OF ITS RIGHTS-OF-WAY.

In the past, the Commission has interpreted Section 253 to preempt only violations of subsection (a) (i.e., prohibitions or effective prohibitions against the provision of telecommunications service.) Under this construction, subsections (b) and (c) of Section 253 are viewed solely as "safe harbors" and cannot be relied upon for preemption authority independent of subsection (a).[4] While there is some support in the language of Section 253 for this interpretation, it is more logical to read subsections (b) and (c) as providing independent bases for preemption.

First, with respect to subsection (b) we note that subsection (d) of Section 253 provides that, if the FCC determines that "a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) ***or*** (b), the Commission shall preempt the enforcement of such statute, regulation or legal requirement."

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[4] See California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, CCB Pol. 96-26, Memorandum Opinion and Order at 25 ("Because the record does not support a finding that the Ordinance falls within the proscription of section 253(a), we do not reach the question whether Section 253(b) applies in these circumstances.")

(emphasis added.) By failing to treat subsection (b) as an independent basis for preemption, the Commission has rendered the reference to subsection (b) in subsection (d) surplusage. This the Commission may not do.[5] By failing to give meaning to that part of Section 254(d) the Commission has failed to carry out the statutory mandate that it preempt any violations of *either* subsection (a) *or* (b).

As to subsection (c) and the management of rights-of-way, that paragraph states that state and local governments may require compensation for management of rights-of-way from "telecommunications providers", whereas paragraph (a) refers to state requirements that have the effect of prohibiting the provision of "telecommunications service". The term "telecommunications providers" includes providers of telecommunications services, those protected by subsection (a), as well as entities that provide basic transmission in a manner that does not make it effectively available to the public.[6] The

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[5] Under general rules of statutory construction the Commission must give meaning to all parts of the statute and all words used. See Sutherland Stat. Const. §§ 46.07; 47.02 (5th ed.).

[6] Compare 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received") with 47 U.S.C. § 153 (46) (defining "telecommunications service" as "offering telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the

Commission's interpretation of Section 253 as mandating that the Commission preempt only violations of subsection (a) renders the reference to "telecommunications providers" in subsection (c) mere surplusage. The only way to give meaning to the reference to telecommunications providers is to make subsection (c) an independent source of preemption.[7]

Proponents of the Commission's construction of Section 253 will no doubt argue that the introductory phrase "[n]othing in this section affects" in paragraphs (b) and (c) mandates that those subsections be treated solely as safe harbors. But the language could just as easily be read to mean that nothing in Section 253 affects the enumerated state and local government activities as long as they comply with the terms of subsection (b) and (c). Such an interpretation is far more consistent with the broader purpose of the Telecommunications Act of 1996 to establish competitively neutral preconditions for local competition.[8]

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facilities used"). In its Universal Service First Report and Order, the Commission recognized and relied upon the distinction between these two terms. See In the Matter of Federal-State Joint Board on Universal Service, CC Dkt No. 96-45, FCC 97-157 (rel. May 8, 1997) at ¶¶ 785-800.

[7] Cf. TCG Detroit v. City of Dearborn, 977 F. Supp. 836 (E.D. Mich. 1997).

[8] It is hard to imagine that Congress would have wanted to remain intact local regulations that, while not raising to the level of prohibiting entry, blatantly discriminated against new carriers. For, example, if a city had a relatively small fee for

Regardless of which interpretation of Section 253 the Commission adopts, however, the instant petition must fail. The exclusive agreement forecloses the ability of other carriers to provide service in an economically efficient manner, is not a valid exercise of the state police power and is not a non-discriminatory , competitively neutral administration of the state rights-of-way.

IV. SECTION 253(a) IS VIOLATED WHENEVER AN AGREEMENT TO WHICH THE STATE OR LOCAL GOVERNMENT IS A PARTY FORECLOSES THE ABILITY OF ANY CARRIER TO PROVIDE SERVICE REGARDLESS OF THE NATURE OF THE AGREEMENT.

The State argues that Section 253(a)[9] does not apply in this case because that section is aimed at laws and regulations that have the effect of prohibiting the ability of any entity to provide telecommunications services, not at the provision of infrastructure, which is the subject of the Agreement. It argues that the Developer is not a provider of telecommunications

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use of the rights-of-way, but only charged that fee to new entrants, the fee might not rise to the level of being a barrier to entry, but should be preempted under paragraph (c).

[9] Section 253(a) provides:

> IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

services and that it will not provide any services to the public. Rather, it will construct the fiber for sale or lease on a wholesale basis.

The State's argument has no merit and its reading of Section 253(a) would set the Section on its head. While the State is correct that Section 253 relates to actions that have the effect of prohibiting any carrier from providing services, the fact that the Agreement in question is not an agreement for the provision of telecommunications services is irrelevant to the question of whether the Agreement has the effect of prohibiting the provision of service by other carriers.

The Commission's inquiry must focus not on what the effect of the agreement is on the Developer nor what the agreement does or does not allow the Developer to do.[10] Rather, the inquiry must focus on whether the Agreement affects <u>any</u> carrier's provision of service. It is irrelevant that the Agreement involves the creation of infrastructure. As is shown below, the Agreement will have a significant impact on the ability of other carriers to provide service.

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[10] Richard J. Johnson articulated this principle in a slightly different way in a letter to the State

> "Section 253(a) is violated not by the addition of ICS/S&W but by the exclusion of many others."

Letter to Scott Wilensky from Richard J. Johnson (Nov. 26, 1997).

V. THE AGREEMENT WILL HAVE THE "EFFECT OF PROHIBITING" A CARRIER FROM OFFERING CERTAIN TELECOMMUNICATIONS SERVICES IN VIOLATION OF SECTION 253.

The State argues, in essence, that because access to the particular rights-of-way covered in the Agreement historically have not been granted to any entity, that the net effect of the Agreement will be to foster competition and to add to, rather than detract from, the inventory of available rights-of-way and infrastructure in the State. The State bases this argument on the fact that the Agreement requires the Developer to collocate fiber of other entities in the relevant rights-of-way at the time of initial installation and obligates the Developer to lease its facilities to other carriers. The State also argues that no entity wishing to construct fiber transport capacity is prohibited from doing so and that there are significant alternative rights-of-way along railroads, gas pipelines, oil pipelines and electric power lines and well as state and county roads along which an entity could construct its facilities.

The Agreement contains no absolute prohibition on the provision of service. Therefore, the Commission's inquiry is whether the Agreement has the "effect" of prohibiting the provision of service. The Commission has previously held that in these circumstances it will consider whether the state action "materially inhibits or limits the ability of any competitor to

compete in a fair and balanced legal and regulatory environment."[11] If it does have this effect the Commission is required to preempt the State action pursuant to Section 253(d).[12]

The requirement relating to concurrently installing other carriers' fiber obviously only satisfies the needs of any carrier that knows today that it will need fiber along the routes within the near future and has the ability to coordinate its schedule with the Developer. Any other carrier that comes along in the next ten (to twenty) years is simply out of luck.[13]

While the fact that the Agreement mandates that the Developer lease capacity to carriers may satisfy the occasional carrier whose business plans happen to call for leasing fiber capacity from another carrier, it does nothing for the carrier whose business plans call for installation and ownership of its own fiber. To require a carrier to provide service via resale, rather than via its own facilities prevents the carrier from

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[11] In re California Pay Phone Association, FCC 97-251 (released July 17, 1997), at para. 31.

[12] Thus, even if the State were correct that the Agreement fosters competition in general and/or increases capacity in the state (a proposition that has not been proven) that fact would be irrelevant if it also prohibits any carrier from providing any service.

[13] In addition, the Developer is required to maintain and operate the fiber owned by third parties. This obviously negates much of the benefit of owning one's own fiber.

providing service in the manner in which it seeks to provide service. The Commission has previously held that restrictions on a carrier's choice of facilities violates Section 253(a).[14]

The State also argues that there are significant other sources from which carriers can obtain access to fiber and lists a number of other carriers who are building networks in the state. Again, of course, even if the state were correct in its assessment, the existence of other sources from which a carrier could obtain capacity does nothing for the carrier with a facilities-based business plan. And, in any event, the question of whether there is sufficient capacity either on the facilities to be constructed or on other carriers' facilities is not a question that should be resolved by the State or the FCC. That is a question for the market, and individual carriers to answer.[15] The entire thrust of the Telecommunications Act of

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[14] In In re The Public Util. Comm'n of Texas, CCB Pol 96-13, FCC 97-346 (released Oct. 1, 1997) the Commission found that:

> Section 253(a) of the Act bars state or local governments from restricting the means by which a new entrant chooses to provide telecommunications. . . .[T]he 1996 Act requires that new entrants be permitted to offer services via resale, incumbent local exchange carrier unbundled network elements, the new entrant's own facilities, or any combination thereof.

Id. at para. 128

[15] Similarly, it is not for city administrators to decide if there are sufficient facilities in an area. Unless there are actual physical limitations to new construction the state and

1996 was to encourage a competitive environment so that state and federal regulation of the telecommunications industry could be lifted. In any event, the Commission should look long and hard at the facts alleged by the State. While ALTS does not have the resources to thoroughly review each and every allegation in the pleading and the attached affidavit of Fazil Bhimani, we note at least one error in the statements. Brooks Fiber, a member of ALTS, is not planning on installing new fiber facilities in Minnesota to carry interexchange traffic as claimed on p.2 of the affidavit of Mr. Bhimani.

Finally, the State argues that for carriers who wish to provide service over their own facilities, there are substantial alternative rights-of-way that can be used including "rights-of-way along railroads, gas pipelines, oil pipelines and electric power lines, as well as state and county roads".[16] However, the State fails to recognize that with the exception of the electric utilities, for whom there is a limited requirement to allow carriers to use their rights-of-way, none of the other utilities have any legal requirement to allow telecommunications carriers access to their rights-of-way. Thus, those rights-of-way are

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local rights-of-way regulation should be limited to coordination of construction schedules, determination of insurance, bonding an indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

[16] Petition at 23.

uncertain, at best. And, in any event, even if the rights-of-way are available, use of them will almost necessarily cause carriers to incur additional expense of routing facilities in a manner that is not the most direct. The state highway rights-of-way at issue in this case are prime, direct corridors between major cities.

VI. THE ACTIONS TAKEN BY THE STATE ARE NOT SAVED BY EITHER PARAGRAPH (b) OR (c) OF SECTION 253 AND PROVIDE INDEPENDENT REASON FOR PREEMPTION.

Finally, the State argues that even if the Agreement "implicate[s]" Section 253(a) it is saved by either paragraph (b) or (c) of that Section. Those paragraphs provide:

> (b) STATE REGULATORY AUTHORITY.- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

The State argues that its exclusive agreement was designed to protect the traveling public and transportation workers under

the public safety rubric of paragraph (b).[17] It further appears to argue that because protection of the traveling public and transportation workers is a police power function that the Commission's review of it should only be to determine whether the regulation is reasonable and nondiscriminatory rather than that it be the least restrictive alternative available.

The Commission, however, is not free to disregard the language of paragraph (b) which includes the word "necessary." Thus, a state policy designed to protect the public safety and welfare will be consistent with Section 253 only if the policy is necessary to promote that interest. The State has not demonstrated that its exclusive arrangement is necessary to protect the public safety and welfare. It has simply asserted that its Agreement is designed to protect the traveling public and transportation workers without any analysis of how it will do that or why a ten year exclusive agreement is necessary or reasonable. The State has not articulated exactly what its safety concerns are. In fact the assertion appears more as an

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[17] The State concludes that:

> [t]he alternative to single-party exclusive access is no access at all; multi-party longitudinal access will unduly compromise public safety and convenience, and [the Minnesota Department of Transportation's] efficient development, maintenance and relocation of freeways.

Petition at 8.

after-the-fact justification for the state's Agreement.[18]

Much of the State freeway rights-of-way at issue in this case are major highways between cities. These are highways that at least in some instances will have wide medians. Rights-of-way work along such highways tends to be along the shoulders or in the median. This is not a case in which a telecommunications provider would be likely to be digging up pavement or otherwise intruding upon the actual traveling lanes of the highways. Therefore, any danger to the traveling public and transportation workers should be relatively minor. At least in some areas work in the median may be only slightly more disruptive than mowing or other maintenance of the median. There is certainly no evidence that access to the rights-of-way need to be restricted to one entity for ten years. There is also no showing that there is any physical limitation that would necessitate access by only one

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[18] It is noteworthy that the State clearly believed that it was exchanging a valuable resource for services for the State. The RFP stated "[the Minnesota Department of Transportation] wishes to barter exclusive rights to freeway right-or-way in exchange for capacity to satisfy immediate and future state needs.

The State has also attached an affidavit by Adeel Lari, a senior administrative engineer for the Minnesota Department of Transportation. Although he concludes that the state should contract with only one entity because of potential harm to "public safety and convenience" he articulates no reasons other than the fact that the construction would result in more vehicles on the right-of-way.

entity.[19]

Finally, the terms of the Agreement are outside the scope of rights-of-way management and are not competitively neutral. Section 253 merely preserves existing State and local government's rights to manage access to rights-of-way. The Commission has stated that this right to manage access includes the "coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, establishment and enforcement of building codes, and keeping tract of the various systems using the rights-of-way to prevent interference between them."

Limiting access for ten years to one entity is far beyond "coordination of construction schedules." While a state or local government may have the power to ensure that construction schedules are coordinated to minimize traffic disruption or unnecessary repetitive pavement cuts and the like they should not have the power to exclude all competitors to the benefit of one.

VII. CONCLUSION

For the foregoing reasons the Commission should refuse to issue the requested order and should, instead preempt the

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[19] The Agreement appears not to limit access to other utilities, rather the limitation appears to be addressed only to other entities seeking to place fiber in the right-of-way. If there is no reason not to foreclose other utilities from the right-of-way there certainly should be no reason to foreclose other providers of telecommunications fiber.

enforcement of the Agreement based upon the violations of Section 253.

Respectfully submitted,

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March 9, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1998, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand as indicated to the parties listed below.

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